

STATE OF MICHIGAN  
IN THE SUPREME COURT

POLICE OFFICERS ASSOCIATION  
Of MICHIGAN

Plaintiff/Appellee,

v

OTTAWA COUNTY SHERIFF GARY A.  
ROSEMA THE COUNTY OF OTTAWA,  
and OTTAWA COUNTY BOARD OF  
COMMISSIONERS,

Supreme Court Docket No. 127503

Court of Appeals Docket No. 244919

Lower Ct. Docket No. 02-42460-CZ

Defendants/Appellants.

KELLER THOMA, *A Professional Corporation*

By: Dennis B. DuBay (P12976)

Richard W. Fanning, Jr. (P55697)

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Michigan Municipal League

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KELLER THOMA A PROFESSIONAL CORPORATION

127503 (43)

THE MICHIGAN MUNICIPAL LEAGUE'S  
MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

4/12

27386

NOW COMES the MICHIGAN MUNICIPAL LEAGUE, by and through its attorneys, KELLER THOMA, P.C., and hereby move for Leave to Appear as *Amicus Curiae* in support of the Application for Leave to Appeal filed by Ottawa County Sheriff Gary A. Rosema, the County of Ottawa, and Ottawa County Board of Commissioners in the above captioned matter, and states as follows:

1. That the Michigan Municipal League ("the League") is an association of hundreds of cities and villages located throughout the State of Michigan. The cities and villages operate as

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CLERK OF COURT  
MICHIGAN SUPREME COURT

public employers within the meaning of the Michigan Public Employment Relations Act (PERA), MCL §423.201, *et seq.*

2. That the League has authorized and directed this office to move this Honorable Court to grant leave to the League to file an *Amicus Curiae* brief in support of the Application for Leave to Appeal filed by Ottawa County Sheriff Gary A. Rosema, the County of Ottawa, and Ottawa County Board of Commissioners.

3. That the appeal in this matter presents the issue of whether a party to a binding arbitration under Public Act 312 of 1969 (Act 312), 423.231, *et seq.*, may raise new issues to be considered by the Act 312 Panel a short time prior to the hearing and after the parties have conducted negotiations, proceeded through mediation and an Act 312 petition and answer have been filed.


4. That the League, as well as its member communities, will be greatly affected by the decision of the Court in this matter. A large number of the member communities of the League have employees who fall within the scope of Act 312. Under the Court of Appeals decision, these communities now face the very real possibility of undergoing months of collective bargaining, completing mediation and proceeding to Act 312 arbitration only to have a union raise any number of additional issues. This would not only greatly affect the League and its member communities, but would destabilize the mechanisms created by PERA and Act 312 to resolve disputes between public employers and the unions representing their employees.

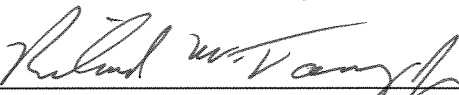
5. That, therefore, the League seeks leave of this Court to file an *Amicus Curiae* Brief in Support of the Application for Leave to Appeal filed by Ottawa County Sheriff Gary A. Rosema, the County of Ottawa, and Ottawa County Board of Commissioners.

WHEREFORE, Michigan Municipal League prays that this Honorable Court grant its Motion for Leave to Appear as *Amicus Curiae*.

Respectfully submitted,

KELLER THOMA, P.C.

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Dated: April 1, 2005  
1449OttawaCountyAmicus.wpd

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KELLER THOMA A PROFESSIONAL CORPORATION

**AMICUS CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE**

**KELLER THOMA, P.C.**

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## QUESTIONS PRESENTED

- I. WHETHER THIS COURT SHOULD GRANT LEAVE TO REVIEW A DECISION OF THE COURT OF APPEALS WHICH CONDONES ACTIONS UNDER ACT 312 OF 1969, MCLA §423.231 *et seq.*, WHICH ARE UNFAIR LABOR PRACTICES UNDER THE PUBLIC EMPLOYMENT RELATIONS ACT (PERA), MCLA §423.201 *et seq.*, WHERE ACT 312 IS SUPPLEMENTARY AND SUBORDINATE TO PERA?

Defendants answer: "Yes"

Amicus Curiae answers: "Yes"

Plaintiff answers: "No"

- II. WHETHER THIS COURT SHOULD GRANT LEAVE TO REVIEW A DECISION OF THE COURT OF APPEALS WHICH JEOPARDIZES THE STATUTORY SCHEME WHICH RESOLVES LABOR DISPUTES BETWEEN PUBLIC EMPLOYERS AND THE LABOR ORGANIZATIONS WHICH REPRESENT CERTAIN PUBLIC EMPLOYEES?

Defendants answer: "Yes"

Amicus Curiae answers: "Yes"

Plaintiff answers: "No"

- III. WHETHER THIS COURT SHOULD GRANT LEAVE TO REVIEW A DECISION OF THE COURT OF APPEALS WHICH INCORRECTLY INTERPRETED SECTION 10 OF PUBLIC ACT 312 OF 1969, MCLA §423.240?

Defendants answer: "Yes"

Amicus Curiae answers: "Yes"

Plaintiff answers: "No"

**STATEMENT OF APPELLATE JURISDICTION**

This Court has jurisdiction pursuant to MCR 7.301(A)(2) and 7.302.

## STATEMENT OF FACTS

*Amicus Curiae* Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort and whose membership is comprised of some 511 Michigan cities and villages. Among its members are 430 city and village members of the Michigan Municipal League Legal Defense Fund which the Michigan Municipal League operates through a Board of Directors. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance. This brief is authorized by the Board of Directors of the Legal Defense Fund whose membership includes: The President and Executive Director of the Michigan Municipal League and the following attorneys who are officers and directors of the Michigan Association of Municipal Attorneys: William B. Beach, city attorney, Rockwood; John E. Beras, city attorney, Southfield; Randall L. Brown, city attorney, Portage; Ruth Carter, corporation counsel, Detroit; Peter Doren, city attorney, Traverse City; Bonnie Hoff, city attorney, Marquette; Andrew J. Mulder, city attorney, Holland; Clyde Robinson, city attorney, Battle Creek; Debra A. Walling, corporation counsel, Dearborn; Eric D. Williams, city attorney, Big Rapids and William C. Mathewson, general counsel, Michigan Municipal League.

The League, as well as its member communities, will be greatly affected by the decision of the Court in this matter. Public Act 312 of 1969 (Act 312), MCLA §423.231 *et seq.* provides for binding arbitration to resolve labor disputes between public employers and unions representing certain employees of police and fire departments. A large number of the member communities of the League have employees who fall within the scope of Act 312. Under the Court of Appeals decision, these communities now face the very real possibility of undergoing months of collective bargaining, completing statutory mediation, proceeding to Act 312 arbitration only to have a union raise any number of additional issues at the Act 312 arbitration hearing. This would not only greatly

affect the League and its member communities, but would destabilize the mechanisms created by PERA and Act 312 to resolve disputes between public employers and the unions representing their employees who are covered by Act 312.

In addition to the facts set forth above, the League adopts the Statement of Facts set forth by the Ottawa County Sheriff Gary A. Rosema, the County of Ottawa, and Ottawa County Board of Commissioners in their Brief to this Court.

### **ARGUMENT**

#### **I. THIS COURT SHOULD GRANT LEAVE AS THE COURT OF APPEALS DECISION WOULD PERMIT PARTIES TO ENGAGE IN UNFAIR LABOR PRACTICES AS DEFINED BY THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT AND WOULD UNDERMINE THE STATUTORY SCHEME WHICH IS INTENDED TO RESOLVE PUBLIC SECTOR LABOR DISPUTES.**

The Court of Appeals decision effectively permits conduct which heretofore would have been a violation of the duty to bargain in good faith under the Michigan Public Employment Relations Act (PERA), MCLA §423.201 *et seq.* It also undermines the legislative scheme which controls collectively bargained relationships in Michigan. Thus, this Court should grant leave to review the Court of Appeals decision.

#### **A. The Belated Introduction of New Issues During Collective Bargaining is a Violation of the Duty to Bargain in Good Faith and is an Unfair Labor Practice.**

The addition of new issues after a long period of bargaining is widely held to be a violation of the duty to bargain in good faith under PERA. PERA imposes a duty upon both employers and unions to bargain in good faith concerning wages, hours and other terms and conditions of employment. Section 15(1) of PERA reads as follows:

A public employer shall bargain collectively with the representatives of its employees as defined in section 11 and is authorized to make and enter into collective bargaining agreements with such representatives. Except as otherwise

provided in this section, for the purposes of this section, **to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment**, or the negotiation of an agreement, or any question arising under the agreement, and the execution of a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party, but this obligation does not compel either party to agree to a proposal or require the making of a concession. MCLA §423.215(1)(emphasis added).

A violation of the duty to bargain in good faith over these mandatory subjects of bargaining is an unfair labor practice under PERA. MCLA §423.10(1)(e) & (3)(c).

Similarly, the Michigan Employment Relations Commission (MERC), which is charged with the administration of PERA and Act 312, has determined that a party violates the duty to bargain in good faith when it introduces new issues late in the bargaining process. For example, in *City of Springfield*, 1999 MERC Lab Op 399, the employer and the union bargained for over a year without reaching a final agreement. Then, the employer raised new issues and demands which were less favorable to the union than its previous positions. The MERC, in affirming the decision of an administrative law judge, determined that the employer's conduct violated the statutory duty to bargain in good faith and was an unfair labor practice. *Id.*, 1999 MERC Lab Op at 405.

Likewise, the National Labor Relations Board has also determined that such conduct constitutes to a violation of the duty to bargain in good faith under the National Labor Relations Act. In *South Shore Hospital*, 256 NLRB 1, the employer and the union engaged in a long process of negotiations but were unable to reach agreement on a new contract. However, after approximately 18 months of negotiations, the employer raised new issues which were less advantageous to the union. The NLRB determined that the employer had:

[E]ngaged in surface bargaining with no real intent to reach agreement but, on the contrary, with an intent to create and prolong a stalemate and destroy the unit employee's support for the Union, and thereby refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act. *Id.*

Thus, there can be little question but that the belated introduction of new issues late in the negotiation process constitutes an unfair labor practice under PERA.

**B. Act 312 is Supplemental and Subordinate to PERA, and Is a Part of a Complex Statutory Scheme Created to Foster Resolution of Labor Disputes Between Public Employers and the Labor Organizations Who Represent their Employees.**

Actions which MERC has identified to be unfair labor practices should not be permitted under Act 312. In enacting PERA and Act 312, the Legislature created a complex statutory scheme to promote the resolution of labor disputes in public employment. As stated above, PERA requires all public employers whose employees elect to be represented by a labor organization to engage in good faith bargaining over the wages, hours and terms and conditions of employment. Further, PERA provides for mediation of disputes which arise between employers and unions during the course of these negotiations. MCLA §423.207. Act 312 supplements PERA and only pertains to certain employees of police and fire departments. MCLA §423.232. It provides for binding arbitration of those disputes which cannot be resolved through negotiation and statutory mediation. MCLA §423.233. Indeed, Section 3 of Act 312 provides:

Whenever in the course of mediation of a public police or fire department employee's dispute, except a dispute concerning the interpretation or application of an existing agreement (a "grievance" dispute), the dispute has not been resolved to the agreement of both parties within 30 days of the submission of the dispute to mediation, or within such further additional periods to which the parties may agree, the employees or employer may initiate binding arbitration proceedings by prompt request therefor, in writing, to the other, with copy to the employment relations commission. MCLA §423.233.

Thus, PERA and Act 312 contemplate that employers and unions representing covered employees will have negotiated over mandatory subjects of bargaining and engaged in state sanctioned mediation before they may proceed to Act 312 arbitration. *City of Manistee v Employment Relations Commission*, 425 NW2d 168, 171; 168 Mich App 422 (1988).

It is well-settled that the role of Act 312 in this statutory scheme is to merely supplement PERA. Indeed, Section 14 of Act 312 provides, in pertinent part, as follows:

This act shall be deemed as supplementary to Act No. 336 of the Public Acts of 1947, as amended, being sections 423.201 to 423.216 of the Compiled Laws of 1948, and does not amend or repeal any of its provisions . . . MCL §423.244 (emphasis added).

The supplementary nature of Act 312 has also been recognized by the Courts. *Metropolitan Council No. 23 v City of Centerline*, 414 Mich 642, 654; 327 NW2d 822, 827 (1982); *Jackson Fire Fighters Ass’n, Local 1306, IAFF, AFL-CIO v City of Jackson*, 227 Mich App 520, 523; 575 NW2d 823, 825 (1998).

As such, an unfair labor practice is exclusively defined by PERA rather than Act 312. It is, therefore, well recognized that the MERC, not Act 312 Panels, has the exclusive jurisdiction and expertise to determine what constitutes an unfair labor practice under the PERA. In *Rockwell v Board of Education for Crestwood School District*, 393 Mich 616, 630; 227 NW2d 736, 742 (1975), the Court held, in no uncertain terms, that: “MERC alone has jurisdiction and administrative expertise to entertain and reconcile competing allegations of unfair labor practices and misconduct under the PERA” (emphasis added). The Court reaffirmed this holding in *Lamphere Schools v Lamphere Federation of Teachers*, 400 Mich 104, 118; 252 NW2d 818, 824 (1977): “The jurisdiction and authority of MERC to determine unfair labor practices were held by this Court to be exclusive” (emphasis in original). *Accord: Labor Mediation Board v Jackson County Road Commissioners*, 365 Mich 645, 654; 114 NW2d 183 (1962); *Van Buren Public School District v Wayne County Circuit Judge*, 61 Mich App 6, 14; 232 NW2d 278, 282 (1975); *AFSCME Council 25 v Wayne County*, 152 Mich App 87; 393 NW2d 889, 895 (1986).

As part of its exclusive authority to define unfair labor practices, the MERC must determine what is, and what is not, a violation of the duty to bargain in good faith. PERA includes definitions

of what actions constitute unfair labor practices. MCLA § 423.201, *et seq.* The Statute specifically makes it an unfair labor practice for a union “to refuse to bargain collectively with a public employer, provided it is the representative of the public employer’s employees subject to Section 11.” MCLA §423.210(3)(c). Enforcement of the bargaining obligation is provided in Section 16 of the PERA, which provides, in part: “Violations of the provisions of Section 10 shall be deemed to be unfair labor practices remediable by the commission in the following manner.” MCLA §423.216 (emphasis added). In carrying out this function, the MERC is charged with interpreting PERA and, when necessary, formulating new legal principles. The Courts have routinely upheld the MERC’s authority to perform this function. *AFSCME Council 25, supra*, 152 Mich App at 97-98; 393 NW2d at 894, *Southfield Police Officers Association v City of Southfield*, 433 Mich 168, 176; 445 NW2d 98, 101 (1989).

Given the MERC’s authority under PERA to define mandatory subjects of bargaining, and the supplementary posture of Act 312 and Act 312 Panels, it is clear that an Act 312 Panel must make determinations which strictly follow the MERC’s prior decisions and which are also subject to the MERC’s ruling in any unfair labor practice proceeding. For example, in the *City of Jackson*, a union took an issue concerning the number of fire fighters on duty per shift to Act 312 arbitration. *Id.*, 227 Mich App at 523-524; 575 NW2d at 825. That Panel ruled that the provision was a mandatory subject of bargaining and determined that the provision should remain in the parties’ agreement. *Id.*, 227 Mich App at 524; 575 NW2d at 825. This award was affirmed by a Circuit Court. *Id.* However, the City filed an unfair labor practice charge. The MERC, in ruling on the City’s charge, determined that it was not bound by the Panel’s decision and that the issue presented by the Union was not a mandatory subject of bargaining. *Id.*, 227 Mich App at 524-525; 575 NW2d at 826.

After remand from the Supreme Court, the Court of Appeals determined that the MERC's ruling prevailed over that made by the Act 312 Panel. The Court specifically noted that, "[t]he MERC – and not an Act 312 Panel – has authority to implement the PERA." *Id.*, 227 Mich App at 525; 575 NW2d at 826. The Court of Appeals then adopted the MERC's ruling, not the Panel's. *Id.* Further, the Court of Appeals held that an Act 312 Panel only has jurisdiction to address whether an issue is a mandatory subject of bargaining in the absence of the MERC rulings and must ensure that its rulings are "concurrent" with those of the MERC. *Id.*, 227 Mich App at 523; 575 NW2d at 825. The Court stated:

When the question whether a matter is mandatorily bargainable arises in an Act 312 arbitration proceeding, the MERC, noting the availability of ultimate judicial review, has recognized that, in the absence of or concurrent with MERC rulings, the arbitration panel has jurisdiction to resolve that question before or as part of the panel's consideration of disputed contract issues. *Id.*, 227 Mich App at 523; 575 NW2d at 825.

Thus, there can be little question that PERA takes precedence over Act 312 and decisions resulting from Act 312 arbitrations must follow existing precedent from MERC.

Further, the discretion of a Panel acting under Act 312 is narrowly circumscribed and must be based upon the record evidence submitted at the hearing and the factors stated in Section 9 of Act 312. The importance of these factors in the statutory scheme cannot be overemphasized. The constitutionality of Act 312 was before this Court in *City of Detroit v Detroit Police Officers Association*, 498 Mich 410; 294 NW2d 68 (1980). An examination of that ruling makes it clear that the Court's decision was based, in large measure, on the key role which the §9 factors play in determining both: (a) the evidence to be presented and relied upon at arbitration hearings, and (b) the nature and scope of judicial review of arbitration awards.

In his opinion in the *City of Detroit* case, Justice Williams quoted §9 of the Act in its entirety, stating:

[T]he panel's decisional authority has been significantly channeled by §9 . . . that section trenchantly circumscribes the arbitral tribunal's inquiry only to those disputes including wage rates or other conditions of employment embraced by a newly proposed or amended labor agreement, and commands the panel to base its findings, opinions and order relative to these narrow disputes on the eight listed factors as applicable . . . 294 NW2d at 81.

On this basis, the Court held that Act 312 satisfied the "reasonably precise standards" test set forth in *Osius v St. Clair Shores*, 344 Mich 693 (1956). Indeed, the Court held that Act 312 does not constitute an unconstitutional delegation of authority because:

. . . the eight factors expressly listed in §9 of the Act provide standards at least as, if not more than, "reasonably precise as the subject matter requires or permits" in effectuating the Act's stated purpose "to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes." MCL §423.231; MSA §17.455(31). These standards must be considered by the panel in its review of both economic and non-economic issues. In its resolution of non-economic issues, the panel "shall base its findings, opinions and order upon the following factors, as applicable, MCL §423.239; MSA §17.45(39) (Emphasis supplied)." See MCL §423.238; MSA §17.455(38). The findings, opinions and order as to all other issues (i.e., non-economic issues) "shall be based upon the applicable factors prescribed in §9." (Emphasis supplied). When these eight specific §9 factors are coupled with the §8 mandate that "[a]s to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in §9, MCL §423.238; MSA §17.455(38) (Emphasis supplied)," the sufficiency of these standards is even more patent. (Emphasis in original, footnote omitted) 294 NW2d at 85-86.

After ruling that Act 312 is constitutional, Justice Williams then considered the second major issue in the *City of Detroit* case; that is, whether the arbitration award issued therein should be enforced. In this discussion, the critical importance of the §9 factors, as well as the interdependence of §§8, 9 and 12 of the Act, was again stressed:

[A]ny finding, opinion or order of the panel on any issue must emanate from a consideration of the eight listed §9 factors, as applicable.

. . . Construing §§9 and 12 together then, our review must find that the arbitration panel did indeed base its findings, opinion or order upon competent, material and substantial evidence relating to the applicable §9 factors. Cf *Caso v. Coffey*, 41 NY2d 153, 158, 391 NW2d 88, 91, 359 NE2d 683, 686 (1976). In other words, the order of the panel must reflect the applicable factors and the evidence establishing

those factors must be competent, material and substantial evidence on the whole record. It is only through this judicial inquiry into a panel's adherence to the applicable §9 factors in fashioning its award that effectuation can be given to the legislative directive that such awards be substantiated by evidence of, and emanate from consideration of, the applicable §9 factors. (Emphasis in original) 294 NW2d at 96.

Justice Williams did not hold that an Act 312 Panel must give all of the §9 factors equal weight. Rather, it is for the Panel to decide the relative importance "under the singular facts of a case although, of course, all 'applicable' factors must be considered."

[T]he Legislature has made their treatment, where applicable, mandatory on the panel through the use of the word 'shall' in §§8 and 9. In effect then, the §9 factors provide a compulsory checklist to ensure that the arbitrators render an award only after taking into consideration those factors deemed relevant by the Legislature and codified in §9. 294 NW2d at 97.

In the *City of Detroit* case, the Court found that the Panel's economic award was supported by competent, material and substantial evidence on the whole record relating to the factors set forth in §9 of the Act. On the other hand, in the Court's view, the non-economic award was defective because the Panel "did not consider all the applicable §9 factors in making its award, as Act 312 mandates."

. . . pro forma deference to the requirements of §§8 and 9 of the Act will not do. These sections, by their terms, require rigid adherence. . . (Footnote omitted) 294 NW2d 103.

In sum, the legislative scheme requires public employers and unions representing Act 312 eligible employees to negotiate in good faith on wages, hours and terms of employment. This duty to bargain in good faith is exclusively defined by MERC. If negotiations do not result in an agreement, the parties may proceed to mediation under PERA. Any issues remaining unresolved after mediation may only then be submitted to a Panel acting under the scope of Act 312. Moreover, this Court's *City of Detroit* decision closely limited and defined the decision-making process in an Act 312 Panel. Any proceeding conducted under Act 312 must abide by prior decisions of MERC,

must be strictly based upon factors enumerated in Section 9 of Act 312, and must be supported by competent, material and substantial evidence on the record.

**C. The Court of Appeals' Decision Should be Reversed as it Permits Parties Under Act 312 to Engage in Conduct Which Amounts to An Unfair Labor Practice Under PERA and Undermines the Statutory Scheme set Forth in Act 312 and PERA.**

Leave should be granted because the Court of Appeals decision in this matter would upset the complex mechanism created by the Legislature and would sanction conduct which actually violates the statutory duty to bargain in good faith. As set forth above, the addition of new issues late in the bargaining process violates the duty to bargain in good faith and constitutes an unfair labor practice under PERA. *City of Springfield, supra; South Shore Hospital, supra*. Clearly, such conduct cannot be authorized under Act 312 as that statute is subordinate to PERA.

Moreover, if allowed to stand, the Court of Appeals decision would encourage parties to act in direct contravention to the complex statutory scheme created to resolve labor disputes between public employers and the representatives of their employees. Indeed, rather the presenting and addressing all areas of disagreement during negotiation and mediation, both unions and employers will have an incentive to withhold issues from discussion until Act 312 arbitration. Parties will, thus, "sandbag" negotiations in an effort to gain an unfair advantage during Act 312 arbitration hearings by bringing forth new surprise issues. Obviously, this is directly contrary to the purpose of PERA and will only discourage good faith negotiations. Moreover, the insertion of new issues at the last moment would only serve to hamper the abilities of the parties to present a complete record on all of the issues to the Act 312 Panel. Obviously, this will reduce the ability of such Panels to base their decisions upon competent, material and substantial evidence as required by this Court's *City of Detroit* decision.

It is vitally important to realize that the *Amicus Curiae* is not simply engaging in idle speculation of possible consequences from this decision. Indeed, the Court of Appeals decision in this case has already led to the exact consequences predicted in this Brief. The very union involved in this case has employed similar dilatory tactics which it used in this matter in negotiations with the City of Dearborn. In that case, the employer filed an unfair labor practice charge with MERC. However, the Administrative Law Judge acting on behalf of MERC found that, in light of the Court of Appeals decision in this case, MERC was powerless to stop the union's gamesmanship. *City of Dearborn*, MERC Case CU04-A-004 (Ex. A).

There can be little doubt that, should the Court of Appeals decision be allowed to stand, both this union and other parties will begin to announce surprise issues late in the Act 312 process. Indeed, without action from this Court, there is nothing to prevent such conduct and there appears to be no remedy for parties aggrieved by these tactics. Thus, in a very real way, it is solely up to this Court to protect the legislative scheme created by PERA and Act 312. There is a clear and vital public importance to this issue which can only be served by granting leave to the Defendants and reversing the Court of Appeals.

## **II. THE COURT OF APPEALS INCORRECTLY INTERPRETED SECTION 8 OF ACT 312.**

Leave to appeal should also be granted as the Court incorrectly interpreted Section 8 of Act 312. That Section gives the Panel the discretion to determine which issues presented by the parties are economic and which issues are non-economic. This is a significant distinction under the Act. Section of Act 312 states:

**At or before the conclusion of the hearing held pursuant to section 6, the arbitration panel shall identify the economic issues in dispute, and direct each of the parties to submit, within such time limit as the panel shall prescribe, to the arbitration panel and to each other its last offer of settlement on each economic issue. The determination of the arbitration panel as to the issues in dispute and as to which of**

these issues are economic shall be conclusive. The arbitration panel, within 30 days after the conclusion of the hearing, or such further additional periods to which the parties may agree, shall make written findings of fact and promulgate a written opinion and order upon the issues presented to it and upon the record made before it, and shall mail or otherwise deliver a true copy thereof to the parties and their representatives and to the employment relations commission. As to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in section 9. The findings, opinions and order as to all other issues shall be based upon the applicable factors prescribed in section 9. This section as amended shall be applicable only to arbitration proceedings initiated under section 3 on or after January 1, 1973. MCLA §423.238(emphasis added).

This Section clearly asks the Panel to “identify the economic issues in dispute.” Thus, this Section is correctly read as only authorizing the Panel to identify whether the issues presented by the parties are economic in nature. This Section should not be read as allowing the Panel to define which issues are in dispute. Indeed, doing so would effectively remove the word economic from the text of the statute. It is well settled that the Courts should avoid interpretations which would render statutory terms meaningless. *In re MCI Telecommunication Complaint*, 460 Mich 396, 414; 596 NW2d 164, 175-176 (1999).

Moreover, the Court of Appeals’ interpretation of this Section of the Act is inconsistent with the statutory scheme created by PERA and Act 312. Indeed, there is simply no need to have the Panel define the issues. As stated above, by the time that the parties reach arbitration under Act 312, they will have bargained for an extended period of time, proceeded through mediation and a petition for Act 312 arbitration and an answer will have been filed with the MERC. Simply put, by the time that the parties reach Act 312 arbitration, the issues in dispute will have been defined by their good faith negotiations under PERA.

However, the Panel does need to determine whether or not the issues presented by the parties are economic or non-economic. This is a significant distinction as the Panel may only give retroactive effect to economic issues. In *Metropolitan Council No. 23 v Board of Commissions of*

*Wayne County*, 86 Mich App 453; 272 NW2d 681 (1978) *lv app den*, the Court of Appeals determined that an Act 312 Panel exceeded its authority by giving retroactive effect to its award on a non-economic issue. In reaching this conclusion, the Court held:

We hold that had the Legislature intended for arbitration panels acting under the 1969 Act to have the power to grant retroactivity to the subject noneconomic provisions, they would have so provided. This Court is constrained to hold that the intent of the Michigan Legislature was not to grant such retroactivity. *Id.*, 86 Mich App at 463; 272 NW2d at 685(emphasis added).

In its response to the County's Motion for Leave to Appeal, the Union correctly stated that Section 10 of Act 312 was amended by Public Act 303 of 1973, and that the *Metropolitan Council* 23 decision addressed Section 10 as it was worded prior to the amendment. However, the Union incorrectly argued that the amendment to the statute authorized retroactivity of non-economic benefits. Rather, Section 10 of Act 312, as it is currently worded, makes no provision for a retroactive award of non-economic benefits. The Act currently reads as follows:

A majority decision of the arbitration panel, if supported by competent, material, and substantial evidence on the whole record, shall be final and binding upon the parties, and may be enforced, at the instance of either party or of the arbitration panel in the circuit court for the county in which the dispute arose or in which a majority of the affected employees reside. The commencement of a new municipal fiscal year after the initiation of arbitration procedures under this act, but before the arbitration decision, or its enforcement, shall not be deemed to render a dispute moot, or to otherwise impair the jurisdiction or authority of the arbitration panel or its decision. **Increases in rates of compensation or other benefits may be awarded retroactively to the commencement of any period(s) in dispute, any other statute or charter provisions to the contrary notwithstanding.** At any time the parties, by stipulation, may amend or modify an award of arbitration. MCLA §423.240 (emphasis added).

This statute clearly does not indicate that an Act 312 Panel may issue retroactive awards on non-economic issues. Rather, in light of the Court of Appeals decision in *Metropolitan Council* 23, the phrase "other benefits" is correctly understood as referring to economic issues other than wages, for example health insurance or pension benefits. Indeed, the phrase "benefits" in Section 10 of Act

clearly refers to economic issues raised by the parties during the course of negotiations. The Union has failed to cite any decision of either the Court of Appeals or this Court which adopts its interpretation of Section 10 of Act 312. As such, it is clear that an Act 312 Panel may only give retroactive effect to an award on an economic issue.

Moreover, Act 312 sets forth a separate reasons why economic issues must be identified. The discretion of an Act 312 Panel in fashioning an award on economic issues is limited to the final offers submitted by the parties. MCLA §423.238. In contrast, the Panel may issue awards on non-economic issues which vary from the parties' final positions so long as the award is based on the Section 9 standards for decision. MCLA §423.238. Indeed, this distinction was explicitly relied upon by this Court in upholding the constitutionality of the Act. *City of Detroit, supra*, 498 Mich at 461-462, 294 NW2d at 85-86. Thus, aside from the issue of retroactive application, the Act also calls for the Panel to distinguish economic and non-economic issues so that the Panel can determine whether it must adopt one of the parties' final offers, or whether it may issue a different award based upon the factors set forth in Section 9 of the Act.


Therefore, it is clear that the phrase in Section 8 of Act 312 upon which the Court of Appeals based its decision refers to the obligation of the Panel to identify which of the issues presented by the parties are economic and which are non-economic within the meaning of the Act. Indeed, prior to the Court of Appeals decision in this case, the issues would have been well developed by the parties during their good faith negotiations and mediation. That language does not, as found by the Court of Appeals, allow the Panel to identify, or permit parties to raise, new issues at what is meant to be the final stage of the statutory process. As the Court of Appeals has seriously misconstrued the Act, this Court should grant leave or reverse the Court of Appeals.

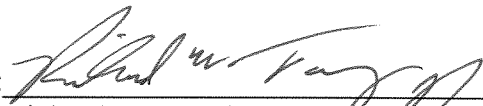
**RELIEF REQUESTED**

The *Amicus Curiae* Michigan Municipal League respectfully requests that this Honorable Court grant the Defendant-Appellants leave to appeal or summarily reverse the decision of the Court of Appeals. Indeed, there is a vital public interest to be served, and action by this Court is needed in order to preserve the statutory scheme created to address labor disputes in public police and fire departments in Michigan.

Respectfully submitted,

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